United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7412

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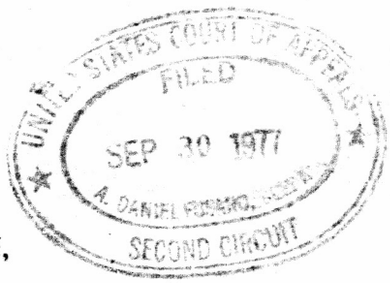
In The

United States Court of Appeals

For The Second Circuit



SPRAGUE & RHODES COMMODITY CORPORATION,

Petitioner-Appellant,

vs.

INSTITUTO MEXICANO DEL CAFE,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLEE

SILBERFELD, DANZIGER & BANGSER
Attorneys for Respondent-Appellee
230 Park Avenue
New York, New York 10017
(212) 867-6500

ROBERT M. BLUM
JUDY A. BLUESTEIN
JAMES G. SAMSON
Of Counsel

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Issues Presented

1. Did the District Court properly dismiss a petition seeking to compel arbitration pursuant to 9 U.S.C. §4 where the affidavits and exhibits submitted show that no arbitration clause was communicated or referred to by the parties?

2. Where a trial on the merits of the dispute has already been concluded by the Superior Court of Mexico and final judgment rendered by it, and the jurisdiction of that court was questioned in that proceeding by one of the defendants therein but was sustained, can that same party now petition the United States court to have the adjudicated dispute referred to arbitration?

[In its petition below, appellant Sprague & Rhodes Commodity Corporation ("Sprague & Rhodes") sought a stay of the Mexican litigation commenced against it by appellee Instituto Mexicano del Cafe ("Instituto") and an order pursuant to Rule 60, F.R.Civ.P., vacating nunc pro tunc the District Court's order granting effect to Mexican Letters Rogatory. The Court below denied this relief. Since Sprague & Rhodes has not appealed these aspects of the decision below, these issues must be deemed resolved conclusively in Instituto's favor.]

STATEMENT OF THE CASE

Nature of the Case

Instituto, an agency of the Mexican government (A-105),* commenced an action (the "Mexican litigation") in the Superior Court of Mexico, Federal District, against Sprague & Rhodes, a New York corporation, and Armando Guzman Villanueva ("Guzman"), Sprague & Rhodes' Mexican agent (A-8, 90, 151). Long-arm jurisdiction over Sprague & Rhodes was sought through the use of Letters Rogatory issued by the Mexican court and granted effect by order of the United States District Court, Southern District of New York (Edelstein, Ch.J.) dated April 26, 1976 (A-37). In the Mexican litigation, Insituto sought the recovery of $606,948.74, with interest and costs, representing the balance of the purchase price for 6,000 bags of Mexican coffee sold by it in Mexico to Sprague & Rhodes.

Through Mexican counsel, Sprague & Rhodes appeared specially in the Mexican litigation and challenged the court's jurisdiction (A-199-202). However, Sprague & Rhodes defaulted in that special appearance, and subsequently filed the instant petition (A-1).

The petition sought an order directing that the dispute between Instituto and Sprague & Rhodes be referred

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* References preceded by "A" are to pages in the Joint Appendix.

to arbitration pursuant to 9 U.S.C. §4. The accompanying motion also sought an order of the District Court pursuant to Rule 60, F.R.Civ.P., revoking Chief Judge Edelstein's order and staying further proceedings in Mexico, on the twin grounds that (a) the officers of Sprague & Rhodes feared that they would be arrested or persecuted if they were to defend the Mexican litigation (A-34), and (b) the Superior Court of Mexico was incapable of competently or fairly deciding the issues (A-35). The District Court (Pierce, J.) declined to direct arbitration, inasmuch as Sprague & Rhodes had failed to make even a threshold showing that there was a written agreement to arbitrate. It also denied the revocation of Chief Judge Edelstein's order and the stay on the grounds that the order was properly issued, that Mexico was clearly the more convenient forum and that the aspersions cast upon the Mexican judicial system were unsupported A-238-240).

This appeal was taken from Judge Pierce's order. In the interim, the Mexican litigation proceeded and has now resulted in a judgment in Instituto's favor against Sprague & Rhodes* in the amount of $606,948.74.

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* Neither the record nor the Appendix contains reference to the judgment, which was in fact rendered by the Superior Court of Mexico in September 22, 1977. We deem the conclusion of that litigation, and its having resulted in a final judgment on the merits, to be so relevant to the issues before this court that it would be improper to permit the appeal to be adjudicated without informing the court.

Fact Statement*

Appellant is a coffee broker in New York City. Respondent is the agency charged by the Republic of Mexico with regulation of Mexico's coffee exports. Instituto also sells coffee for its own account, and is Mexico's largest coffee exporter. Its principal office is in Mexico City.

Background of the dispute.

Sprague & Rhodes had purchased coffee occasionally in 1970 and 1971 from Beneficios Mexicanos de Cafe, the agency which preceded Instituto as coffee export controller (A-21). For several years, however, Sprague & Rhodes had purchased scarcely any Mexican coffee (only one percent of its purchases; A-225); and apparently had become unfamiliar with the Mexican coffee trade (Gonzalez, A-126). In late 1974, it engaged Guzman, a citizen of Mexico and a resident of the Federal District, as its agent for all purchases from Instituto (and apparently for all its contemplated Mexican transactions); and so advised respondent by Telex (A-138). In fact, Guzman was new to the coffee export business, and had never dealt before with respondent in export transactions (Gonzalez, A-130). He had purchased coffee from Instituto previously for exclusively Mexican con-

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* Frequent references are made in this Fact Statement to the affidavits of Lic. Hector Garza Rodriguez (Instituto's general counsel), Lic. Eduardo Gonzalez A. (Instituto's sales manager) and Lic. Jorge Leon Orantes V. (partner in Mexico's largest law firm, Goodrich, Dalton, Little & Riquelme). Such references will be abbreviated "Garza," "Gonzalez" and "Orantes" with reference to the appropriate Appendix page number.

sumption (Garza affidavit, A-116).

On July 29, 1975, Guzman personally visited Instituto's sales department and negotiated on behalf of appellant a purchase of three thousand bags of green coffee,* new crop. Instituto filled out its usual internal record of the sale (A-219). At Instituto's request (Garza affidavit, A-109), Guzman confirmed this purchase with a letter dated the same day (A-139). It stated, in pertinent part:

> "In my capacity of representative of Sprague & Rhodes Com. Corp., I am pleased to confirm hereby the following acquisition:
>
> "3,000 bags Prime Washed Coffee, new crop, at a price of $80.00 Dlls./100 pounds, F.O.B. Laredo, Texas
>
> "Terms of Payment: Sight Draft against Bill of lading, or telephonic transfer of funds to the account and bank which you indicate (against bill of lading).
>
> "Delivery: As soon as possible.
>
> "The above shall be confirmed by the Purchase Agreement which is to be remitted by the buyer and shall also be confirmed by telex."

Thus, the terms essential to formation of a contract were set forth; other terms, whether respecting arbitration or otherwise, were referred to.

Two days later Instituto received by Telex directly from Sprague & Rhodes the further confirmation it had sought (A-137). That Telex succinctly confirmed Guzman's

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* The term "green coffee" refers to the unroasted beans.

authority* and the purchase of the three thousand bags. It also referred to "contract 5437-F" which Sprague & Rhodes said it was sending. Such numbered contract form was never received by Instituto; and Sprague & Rhodes does not claim that it was. Nor was any other writing or communication ever received by Instituto to confirm or modify the transaction.

No provision in the July 31st Telex (A-137) mentioned or referred to arbitration or to any standard form of contract.

The coffee ordered was for prompt shipment (A-139). On August 13, 1975, Guzman again presented himself at Instituto's sales office in Mexico City (Garza Affidavit, A-110) and again orally ordered three thousand bags of new crop coffee, requesting that delivery be accelerated so that the two orders aggregating six thousand bags might be delivered together (id.). The order was accepted, and again Instituto's usual business record of the transaction was prepared (A-220). No written confirmation of this order was received by Instituto from either Guzman or appellant; and no discussion was ever had with anyone respecting arbitration of any dispute arising out of the order (Garza affidavit, A-102).

In Mexico, the coffee trade is fast-moving. Mexico has become the fourth-largest coffee exporter in the

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* A Telex several months earlier (A-138) had first apprised Instituto that Guzman had become Sprague & Rhodes' Mexican agent.

world (Gonzalez affidavit, A-126, 127). The overwhelming bulk of its sales are made by Telex, by telephone or face-to-face negotiation (id.). The sales of Instituto (Mexico's largest coffee exporter) are seldom if ever made on long-form writings, whether or not the purchaser is a member of the Green Coffee Association ("GCA"). While it is customary for a written confirmation ultimately to be issued by United States purchasers, these confirmations always arrive long after the sale has been agreed upon, and are often received after shipment is made (id., A-126-128). Nor are they always confirmed on GCA forms: Instituto receives confirmations in many different types of form, both from the United States and elsewhere (id.).

The overwhelming majority of all Mexican coffee sold to United States purchasers is delivered through the inland city of Laredo (Gonzalez affidavit, pars. 7-8; A-128-129). Deliveries from coffee-growing districts in Mexico to customs brokers or warehouses at the Nuevo Lardo border point are customarily made by truck or rail. The speed with which such deliveries are made, as contrasted with the much slower ocean voyage deliveries which are required for virtually every other source of coffee, has reduced the issuance of confirmations by the purchaser to a matter of post-delivery housekeeping, rather than a means for negotiating the terms of a sale (id.).

Moreover, since large orders may be composed of small shipments in several trucks bringing various amounts

of coffee bags from a number of different districts, it has become impracticable to attach a sight draft to the waybills or bills of lading issued by each carrier and thus to collect the purchase price before the coffee is delivered. Therefore, the practice for shipments from Mexico to the United States through Laredo is for the Mexican seller's border warehouse to send a certificate of arrival to the exporter, evidencing delivery to the purchaser's customs broker. The exporter in turn attaches it to a sight draft, commercial invoice, certificate of origin, export permit and other appropriate documents; all of which are then submitted through bank channels to the purchaser (id.).

The six thousand bags in question here were, in accordance with this procedure, delivered by Instituto's Nuevo Laredo warehouse to Sprague & Rhodes' Laredo agent, Carrillo & Co., a customs broker, on August 20, 1975 (see Certificate of Arrival, A-217).*

Coffee exported from Mexico to the United States is shipped in bags which clearly identify the seller (Gonzalez affidavit, par. 9, A-129); and accompanied by waybills which also identify the source (id.). Such was the case with these six thousand bags: the Certificate of Arrival issued at the border by appellant's agent Carrillo names Instituto as the "shipper of exporter" (A-217). In accordance with its customary practice, Instituto promptly

* Carrillo immediately shipped the coffee to respondent's customers in the United States (Carrillo letter, A-143, 144); railway bills of lading, A-145-150).

so advised appellant's agent Guzman (Gonzalez affidavit, par. 6; A-128). Even before the sight draft and other documents, including the Certificate of Arrival, could be assembled by Instituto for submission to Sprague & Rhodes, Instituto received from Sprague & Rhodes a payment of $120,933.02, accompanied by a Telex from its bank to Instituto's bank stating that transmission of this partial sum was "subject to final payment" (A-179).

Accordingly, Instituto's commercial invoice and sight draft were prepared so as to require payment of the balance, which was $606,948.74. These documents were transmitted to appellant on August 28, 1975 (A-180, 181; Garza affidavit, pars. 27-28, A-115).

On September 11, 1975, appellant advised Instituto that it had made full payment* for all of the coffee, in addition to the $120,933.02 paid to Instituto, by paying for two thousand bags to one Manuel Penagos Lara ("Penagos"), a Mexican citizen, and by paying for the remaining three thousand bags to Cafes de la Fronter ("Frontera"), a Mexican concern owned by Guzman. Sprague & Rhodes apparently concedes that it never received any sight draft or export proofs from Penagos or Frontera; but nevertheless it refused any further payment to Instituto.

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* It actually admits payment of only $614,525 for all six thousand bags, although the agreed aggregate price was $727,881.76 (Garza affidavit, footnote, A-111). Sprague & Rhodes has never accounted for the discrepancy; but Guzman has said that appellant required him to make up some portion of it from his own funds (Guzman Answer, Par. XV, A-173).

As a public agency of the Mexican government for control of coffee export, Instituto licenses all private Mexican exporting concerns. Such export licenses are issued anew each quarter, upon prior receipt of proof by such exporters that they already own the coffee they wish to export (Gonzelez affidavit, par. 14, A-131). These individual licenses specify the number of bags permitted to be exported, the kind of coffee permitted to be exported, and the port through which exportation is to occur. Instituto makes export license and permit information available to the public upon inquiry (Garza affidavit, pars. 11-13; A-107-108).

The records of Instituto establish that neither Penagos nor Frontera was licensed to export coffee in the third quarter of 1975. Frontera apparently never held an export license of any kind; Penagos had been licensed to export one thousand bags only in June 1975 (id.; Gonzalez affidavit, pars. 10-11; A-130).

Settlement discussions alternated with demands. While claiming that it had been deceived by Guzman into making payments to unlicensed entities which did not deliver coffee to it, Sprague & Rhodes apparently quietly pocketed thousands of dollars refunded from Guzman.* Although Sprague & Rhodes assured Instituto it would assign its alleged claim

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* Garza affidavit, par. 33, A-117; Guzman's Answer, par. XV, A-173. When appellant proposed to Garza that it accept only $30,000 in full settlement of its $606,948 deficit account, Garza (who speaks but little English) believed the offer was for a bribe (Garza affidavit, pars. 34-38; A-117-119). Charges and countercharges followed (id.)

against Guzman (A-84), it was made aware that Guzman was desperately in debt for his own purchases of coffee from Instituto for Mexican domestic consumption (A-31). And notably, Sprague & Rhodes never made any move to recover the $153,638 which it admits having paid to Penagos in apparent error (Bloom affidavit, pars. 4 and 26, A-14, 25).

Instituto at first pressed Guzman for payment, following appellant's request; but Guzman's checks bounced. (Garza affidavit, par. 32; cancelled check and cancelled receipt; A-116, 83, 198.) Sprague & Rhodes continued to deny having authorized Guzman to purchase the six thousand bags for its account.

Commencement of the Mexican litigation.

Instituto was left with no alternative but to sue both Sprague & Rhodes and Guzman for payment of the $606,948.74. On March 23, 1976 it commenced an action against Guzman and appellant in the Superior Court of Justice of Mexico, in the Federal District (A-151). In accordance with Mexican law applicable to commercial claims arising against both Mexican and non-domiciliary defendants, Instituto procured the issuance of Letters Rogatory from the Mexican court to the United States District Court, Southern District of New York. Such letters requested service of notice and the Mexican complaint upon Sprague & Rhodes in New York City.

By order dated April 26, 1976 (filed May 13, 1976), an order was issued by Chief Judge Edelstein giving effect to such Letters, i.e., directing due service of a

copy of the Mexican summons and complaint upon Sprague & Rhodes, pursuant to Title 28 U.S.C. §1696(a). Such service was promptly effected.

Mexican procedure specifically provides for an opportunity for a defendant to appear generally or specially to raise challenges to a Mexican court's jurisdiction, or to request arbitration (Orantes affidavit, pars. 7-12; A-92-95). In prompt exercise of this right (an appearance "gestor oficioso"), Sprague & Rhodes employed Jaime Gonzalez Bendiksen, Esq., a partner of the Sepulveda group, a Mexico City law firm, to enter an appearance and claim incompetence of the Mexican court for jurisdictional deficiency (id.). After acceptance of his petition by the Mexican court for consideration subject to posting bond, Gonzalez Bendiksen let his petition lapse. The entire file on this special appearance is reproduced in the Joint Appendix (A-199-216).

Proceedings in the court below.

The instant proceeding was commenced by Sprague & Rhodes, on July 15, 1976, a day or two after its jurisdictional challenge terminated in Mexico. By its petition, brought on by order to show cause (A-11), Sprague & Rhodes claimed the existence of a written agreement to arbitrate -- the general arbitration clause which appears on the reverse side of the GCA-type confirmation forms which appellant avers that it uses in connection with its coffee purchases.*

* Interestingly, the arbitration clause to which appellant refers (its brief herein at page 4) implies that it does not become effective unless the confirmation form has

It sought a direction of the District Court requiring the parties to arbitrate their dispute in New York before the Green Coffee Association (A-5).

The basis upon which Sprague & Rhodes claimed that it was entitled to arbitration was that its contract No. 5481 (A-76), dated August 6, 1975 for one thousand bags of coffee at 79-1/2 cents per pound, constituted the "written arbitration agreement" required by the Federal Arbitration Act (affidavit of Jack Bloom, Sprague & Rhodes' Executive Vice President, par. 40; A-31). Instituto responded with proof that (a) Sprague & Rhodes did not allege or show delivery of its 5481, (b) its 5481 was in fact never delivered or received by Instituto, (c) if it had been delivered, it would have been rejected, since Sprague & Rhodes' only order then extant was for three thousand bags at 80 cents per pound (A-139), and finally (d) since Sprague & Rhodes paid for one thousand bags of the coffee it received, there was no open dispute respecting that portion of the shipments (Garza affidavit, A-112, 113). No contention was made below by Sprague & Rhodes that its contract No. 5437-F was the "written arbitration agreement," nor was the theory advanced that anything had been "incorporated by reference." Such contentions are made by Sprague & Rhodes for the first time

actually been signed by the coffee seller. This is inferable from the reference in the clause to "controversies relating to ... obligations of the signatories ..." emphasis added). Of course, appellant has never contended in the case at bar that Instituto signed any of the confirmation forms purportedly issued by Sprague & Rhodes in the summer of 1975.

before this court.

Judge Pierce found that appellant had failed to sustain "its threshold burden of demonstrating the existence of a written agreement between the parties which contains an arbitration provision" (A-238), and that it had produced no evidence tending to show delivery to, or receipt, execution or assent by, Instituto of such a writing.

> "Absence of such a delivered writing also precludes petitioner from relying upon N.Y. U.C.C. §2-207 ... [or] any reliance upon U.C.C. §1-205 and §2-207(3)." (A-238, 239.)

By simultaneous motion, Sprague & Rhodes sought an order revoking Chief Judge Edelstein's order granting effect to the Mexican Letters Rogatory, and staying the Superior Court of Justice of Mexico from proceeding further with the Mexican litigation (A-11). In support of this application, the Bloom affidavit claimed (for reasons not specified, and without any tender of corroborative materials) that it was the practice of Mexican courts routinely to decide against parties involved in litigation with the Mexican government (A-34, 35); and that he and his colleagues feared that if they were to appear in Mexico to oppose the litigation, they might be thrown into jail until they agreed to settle (id.).

The Bloom affidavit was remarkable also for its assertion (A-34, 35) that "[a] party cannot make a 'special appearance' to contest jurisdiction in Mexico ..."; for in fact, Sprague & Rhodes had itself already done precisely that: appeared specially in the Mexican litigation through its gestor oficioso and abortively challenged the jurisdic-

tion of that court (supra, p.12).

The Edelstein order was found by Judge Pierce to have been a proper exercise of judicial discretion. The Bloom aspersions cast upon Mexican courts and Mexican justice, repudiated by the Orantes affidavit (A-95-99), were rejected by Judge Pierce as:

> "... unsupported and unpersuasive, and as mere bald assertions, [which] do a disservice to the judicial processes of a sister nation." (A-239.)

Instituto brought to Judge Pierce's attention for the first time the fact that a gestor oficioso special appearance had been made by appellant (Orantes affidavit, A-93. 199). It also stressed the essentially Mexican nature of the dispute; that Mexican commercial law governed the transaction; that the agent Guzman was obviously a critical but hostile witness, whose testimony Instituto could scarcely subpoena for use in a New York arbitration, and who in any event (because of his highly questionable activities in these transactions) the Republic of Mexico would be unwilling to have cross its borders (A-122-123). It stressed that considerable public funds of that government had already been expended to launch and maintain the Mexican litigation. It questioned (as it does here) the power of a United States court to stay a litigation validly brought in a Mexican court by a Mexican governmental agency to pursue a claim against a Mexican citizen and a United States corporation arising from a sale of Mexican produce upon an order placed in Mexico by the Mexican defendant.

Judge Pierce reviewed the involvements of the dispute with Mexico, and observed that it was essentially a Mexican affair with "only petitioner ... truly present in New York." He concluded:

> "If petitioner's position concerning the absence of a contract [to purchase the coffee] is as meritorious as it claims, it can present all its arguments to the Mexican court." (id.)

Upon the issuance of Judge Pierce's order dismissing the proceeding, Sprague & Rhodes promptly noticed its appeal. Settlement discussions followed, leading to a tentative understanding for the settlement of the dispute. However, Instituto declined to go forward with the settlement when it was found by Mexican counsel for both parties that the claim, which was to be assigned or prosecuted in Mexico by Sprague & Rhodes for Instituto's benefit as a substantial portion of the settlement consideration, was defective.* Accordingly, Sprague & Rhodes sought and obtained an order re-instating this appeal.

In the meantime, the Mexican litigation has gone forward. The only stay stipulated to by the parties expired August 17, 1976 (A-87). Sprague & Rhodes never revived its appearance therein. On September 22, 1977, judgment was entered against Sprague & Rhodes for the entire unpaid balance, together with interest at six (6%) percent per annum, plus court costs and legal fees incurred by Instituto in the matter.

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* Affidavit of Robert M. Blum, sworn to August 2, 1977.

POINT I

THERE EXISTS NO WRITTEN AGREEMENT TO ARBITRATE WITHIN THE MEANING OF THE FEDERAL ARBITRATION ACT OR THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

Instead of generally appearing in the Mexican litigation, and contesting the merits in a forum where the Instituto personnel, Guzman, Penagos and Cafes de la Frontera -- virtually all of the participants and witnesses -- were located, Sprague & Rhodes has demanded arbitration under the Federal Arbitration Act (9 U.S.C. §4).

In so doing, it has ignored the absence of the fundamental prerequisite for invoking that Act: a written agreement to arbitrate.

> "A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States ... for an order directing that such arbitration proceed ..." 9 U.S.C. §4 (emphasis added).

However strong may be the policy favoring enforcement of arbitration provisions, the federal courts have firmly and repeatedly declared that a written provision, actually transmitted or clearly identified by one party to the other and accepted by the latter as a term of the transaction, "is the sine qua non of an enforceable arbitration agreement." Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960); C. Itoh & Co. (America) Inc. v. Jordan International Company, 552 F.2d 1228, 1238 (7th Cir. 1977); A/S Custodia v. Lessin International, 503 F.2d 318 (2d Cir.

1974); Medical Development Corp. v. Industrial Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973); Ward Foods, Inc. v. Local 50 Bakery & Confectionary Workers Union, AFL-CIO, 360 F.Supp. 1310 (S.D.N.Y. 1973); Joseph Muller Corporation, Zurich v. Commonwealth Petrochemicals, Inc., 334 F.Supp. 1013 (S.D.N.Y. 1971); Garnac Grain Company, Inc. v. Nimpex International, Inc., 249 F.Supp. 986 (S.D.N.Y. 1964).

It is on this unbroken line of authority that Judge Pierce relied in dismissing Sprague & Rhodes' petition below, when he declared that:

> "The Court concludes that petitioner has failed to carry its threshold burden of demonstrating the existence of a written agreement between the parties which contains an arbitration provision. This is an essential requirement which is lacking even in petitioner's offer of proof." (A-238.)

Sprague & Rhodes has strained to avoid the glaring weakness of its position: under the Act, arbitration cannot be forced upon a party which did not assent to a written arbitration clause. It has adverted repeatedly and irrelevantly to its alleged practice in other transactions of submitting to its suppliers confirmations which do contain arbitration clauses. But here Sprague & Rhodes has neither alleged nor shown the delivery of any writing containing even a mention of the word "arbitration," much less one containing an arbitration clause.

A. The affidavits and exhibits in the Appendix establish that neither an arbitration clause nor any reference to it was communicated to Instituto.

No written arbitration provision exists in this case. No GCA contract form, nor any other writing referring to arbitration, was delivered to Instituto with respect to any coffees purchased during 1975.* Nor has Sprague & Rhodes offered one particle of proof that arbitration was even mentioned until its petition herein was filed.

The record establishes that the only writings which ever passed between Sprague & Rhodes and Instituto in the formation or confirmation of the two purchase orders for the six thousand bags of coffee were Guzman's letter of July 29, 1975 (A-139) and Sprague & Rhodes' Telex of July 31, 1975 (A-137). Neither of those communications refers to "arbitration" or any other device for resolving disputes. Neither of those communications makes any reference to the Green Coffee Association, or to a GCA standard form of contract.

The Telex (A-137) refers only to "contract 5437-F" a numerical designation apparently typed by Sprague & Rhodes on one specimen of its confirmation form. The GCA form of contract apparently used by Sprague & Rhodes, it must be noted, does not even contain a form number (A-66). Despite the efforts of appellant's brief to create the impression that a reference to "5437-F" necessarily referred to a GCA standard form, this is simply not so: "5437-F" was nothing more than a number which Sprague & Rhodes is supposed to

* Indeed, no GCA form or other arbitration agreement respecting coffee purchases from Instituto has been delivered to it by or on behalf of Sprague & Rhodes since 1971.

have typed on its blank purchase confirmation form. Instituto, which receives many kinds of confirmation forms (Gonzalez affidavit, par. 4; A-126-127), therefore could not have known what a "5437-F" was.

Moreover, as the Bloom affidavit declares (pars. 19, 20 and 22; A-23-24), Sprague & Rhodes' contract 5437-F was never intended by Sprague & Rhodes itself to confirm the purchase of any coffee. In paragraph 22 of the Bloom affidavit (A-22) there is an expurgated incomplete quotation from Sprague & Rhodes' letter of July 31, 1975 to Guzman. As deliberately cropped for the purposes of the Bloom affidavit, that critical internal communication appeared merely to describe Sprague & Rhodes' confirmation form 5437-F as "for Registration purposes."

The complete text of that letter has only now come to hand, with the completion of the Mexican litigation. Because it is dispositive of Sprague & Rhodes' assertion* that its form 5437-F constituted the contract or confirmation for the first three thousand bags of coffee it bought, we now set forth at length the entire sentence and the relevant preceding sentence. The portion expurgated by the Bloom affidavit has been underscored:

> "We are pleased to enclose our C5437-F to 5440-F inclusively for a total 9,000 bags of coffee.

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* Not made in the petition, nor in the affidavits and memoranda submitted by Sprague & Rhodes to Judge Pierce; but raised for the first time in this case by appellant's brief to this court at pages 25-26 thereof.

"It is understood that these contracts are issued for Registration purposes only and do not constitute a purchase on the part of the Sprague & Rhodes Commodity Corporation."

This communication makes it crystal clear that Sprague & Rhodes' 5437-F was not intended by it to buy coffee; and that if Instituto had ever asked Guzman for an additional confirmation of a portion of the coffee bought, he was under instruction from his principal Sprague & Rhodes not to use that form for the purchase of coffee.* Clearly, then, Sprague & Rhodes could not have intended to arbitrate, when it did not intend to purchase.

To be sure, Sprague & Rhodes "sent" its 5437-F -- not to Instituto, but only to its own Mexican agent, Guzman (A-24). Nowhere in its affidavits or exhibits does Sprague & Rhodes claim or contend, or offer any proof to show, that any such contract form, bearing any number, was delivered to Instituto to confirm or contract for the July-August 1975 purchases made by Sprague & Rhodes. On the other hand, Instituto's denial of receipt of any such document (A-109, 110) is corroborated in the complaint it filed against Guzman and Sprague & Rhodes in the Mexican litigation (para-

* That Sprague & Rhodes even sent "registration contracts" to Mexico is itself revealing. As Instituto's regulations, on file with the ICO, establish, there is no such thing as a "registration contract" in Mexican coffee export; and there can be no transfer or assignment of export contracts or export licenses (Gonzalez affidavit, pars. 13 and 14; A-130-132). It seems clear, therefore, that 5437-F was not to be used to purchase coffee, and that Sprague & Rhodes was either conniving with Guzman to engage in illegal transactions, or was duped by him into unwitting participation in such speculations. Since appellant seems expert at posing rhetorical questions in its brief, perhaps we may be permitted one: does the "F" after the number "5437" stand for "phony"?

graphs III and V thereof; A-154, 155). Guzman, Sprague & Rhodes' own agent, has admitted under oath the truth of these allegations of the Mexican complaint (answer of Guzman; A-172), further confirming that he was authorized and instructed by Sprague & Rhodes to place orders for the six thousand bags of coffee in question (id. and A-173. See, also, Guzman-Instituto Acknowledgment of Indebtedness; A-186).

In its petition herein, Sprague & Rhodes contended that it entered into an agreement "in writing" for the purchase of one thousand bags of coffee from Instituto (par. 5; A-2), attaching its form 5481 (A-76-77), and averring that such form was the "agreement in writing." Again, however, Sprague & Rhodes has never contended, by petition, affidavit, exhibit or tender of proof, that its number 5481 was sent to or received by Instituto; and, again, both Instituto and Guzman have sworn that no such delivery was made (A-154, 155, 172).* It is interesting that Sprague & Rhodes is no longer attempting to characterize the said 5481 as the agreement to arbitrate.

In sum, then, no arbitration clause was tendered to Instituto or received by it; and no claim has been made

* Indeed, as the Garza affidavit declares (par. 22, A-112, 113), if such a form had been received, it would have at once been rejected; since there was never any purchase order placed by Sprague & Rhodes for only one thousand bags of coffee, and since the price differed from that specified in Guzman's letter (A-139). Each of the two orders in question was for three thousand bags; and Sprague & Rhodes had had no dealings with Instituto for fully four years prior to the summer of 1975 (Bloom affidavit, A-21, 22).

(until it became necessary to the argument now adduced by Sprague & Rhodes' brief in support of this appeal) that even hypothetical proof may exist to the contrary. Reduced to plain language, Sprague & Rhodes seeks arbitration only because (a) it may have wanted to deliver a written confirmation containing an arbitration term, (b) four years earlier it had sent Instituto's predecessor agency written confirmations with an arbitration term, and (c) it had "invariably insisted"* upon written arbitration agreement with others, although it concedes it did not do so here.

Under these facts, no right to compel arbitration exists. The requirement of a writing is literal.**

> "[T]he statute upon which plaintiff relies to compel arbitration is available only to a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration ...' 9 U.S.C. §4 (emphasis added). 'The statutory requirement of a writing is not merely surplusage and has repeatedly been given effect by the courts [citing cases]." Ward Foods, Inc. v. Local 50, supra, 360 F.Supp. at p. 1312.

The opinion in Medical Development Corp. v. Industrial Molding Corp., supra, 479 F.2d 345 (10th Cir. 1973), clearly demonstrates the precept that an undelivered arbitration clause cannot bind. There, three closely related transactions between the same parties took place in September 1969 and April and May, 1970. Plaintiff buyer sued for

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* Bloom affidavit, paragraph 8 (A-17).

** This is especially so in international transactions, where the more restrictive definition contained in Article II, Section 2 of the Convention applies.

breach of warranty; defendant seller sought a stay and a direction for arbitration under 9 U.S.C. §§3 and 4. In each instance the seller sent its confirmation before shipment of the goods.

It was conceded that the September transaction was arbitrable: presumably the buyer signed the confirmation form which contained the arbitration clause. However, the second transaction (April 1970) involved an oral purchase order, and the conceded submission to the buyer of the seller's standard "Q182-70" form containing an arbitration clause on its reverse side. The court remanded for a specific determination whether the buyer knew or ought to have known that the confirmation form it received contained an arbitration clause, and must therefore be bound by it.

On the May 1970 purchase, the third transaction, the seller initially tendered a written sales contract, in which it said "for all other terms and conditions reference is made to Quotation 182-70 a copy of which is attached." (479 F.2d at 369.) However, only a photocopy of the front of a Q182-70 form was attached; the arbitration clause was on the undelivered back portion. On these facts, the Tenth Circuit denied arbitration as to the May transaction.

We believe that the case at bar presents even stronger grounds for denying arbitration. In Medical Development, the seller obviously intended to submit its full standard form to confirm the sale but carelessly failed to submit a part of it. At bar, Sprague & Rhodes never in-

tended to deliver its 5437-F as a confirmation, and so instructed Guzman. In Medical Development, the Q182-70 confirmations from the two previous related transactions were in the buyer's hands; at bar, Institut had only the non-specific references in the Guzman letter (A-139) and the Telex (A-137). In Medical Development, the confirmation form was received in all three transactions before delivery; at bar it was never even tendered to Instituto. As the Tenth Circuit declared:

> "Defendant's argument that reference to the Q182-70 quotation confirmation would cause a prudent man to realize that the arbitration clause of that document was applicable to the May transaction is not persuasive. The fact is that the pertinent portion of document Q182-70 was not attached or exhibited. By supplying only part of document Q182-70, defendant at the very least created an ambiguity whether the balance of the document was incorporated. Defendant caused the ambiguity, and the effect thereof must be construed against it." 479 F.2d, at p. 349.

Even where both parties evince a desire to arbitrate, arbitration cannot be had unless their intentions are in writing and fully mesh. Lea Tai Textile Co., Ltd. v. Manning Fabrics, Inc., 411 F.Supp. 1404 (S.D.N.Y. 1975); Superior Shipping Co. v. Tacoma Oriental Lines, Inc., 274 F.Supp. 25 (S.D.N.Y. 1967); and where there is neither writing nor clear expression of common arbitral intent, the court is powerless to require arbitration.

As Judge Pollack has even more recently noted, while arbitration agreements need not be signed in order to bind, and parties may commit themselves by conduct, "...

there must be a writing to which the conduct may attach." A.B.C., Inc. v. AFTRA, 412 F.Supp. 1077, 1084 (S.D.N.Y. 1976).

B. The inapplicability of the "incorporation by reference" doctrine.

In its memoranda before Judge Pierce below, Sprague & Rhodes argued that the Uniform Commercial Code ("UCC"), §2-207, and possibly UCC §1-205, required these transactions to be viewed as arbitrable. These contentions it has now apparently abandoned* in favor of the claim that its never-delivered and never-received confirmation forms were incorporated by reference.

Sprague & Rhodes misconceives the nature and application of the incorporation by reference doctrine. We do not question the basic principle that, by assenting to a writing which clearly incorporates another available writing, one may be bound to the terms of that other writing if its meaning is sufficiently clear. But we are aware of no decision in arbitration law, whether under the Federal Arbitration Act or New York's Arbitration Law,** nor has Sprague & Rhodes cited any, in which a party was found to have assented to an arbitration clause which was never referred to or made available to him.

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* Lest there be question, however, they are dealt with in subparts C and D of this Point I, below.

** Article 75, New York Civil Practice Law and Rules. The arbitration clause which Sprague & Rhodes contends is applicable to this dispute itself provides that the arbitration law of New York State is to govern (A-67; appellant's brief, at pp. 4-5).

Rather, in order to refer a dispute to arbitration, the courts have required that the arbitration clause, if not actually delivered to the party who is resisting arbitration, (i) be expressly referred to in a writing received by such party (e.g., Bigge Crane & Rigging Co. v. Docutel Corp., 371 F.Supp. 240 (E.D.N.Y. 1973)), or (ii) be contained in previous written contractual dealings between the same parties, which are referred to in the writings in question (e.g., A.F. of L. v. Western Union Telegraph Co., 179 F.2d 535, 538 (6th Cir. 1950), American Home Assurance Co. v. American Fidelity & Cas. Co. Inc., 356 F.2d 690 (2d Cir. 1966)); or (iii) be contained in an independent free-standing contract which was available to such party, such as a charter party contract or a general construction contract (e.g., Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F.Supp. 396 (S.D.N.Y. 1966), Vespe Contracting Co. v. Anvan Corp., 399 F.Supp. 516 (E.D.Pa. 1975)); or (iv) be set forth in a discrete body of published rules which are expressly incorporated in the writings between the parties to the dispute in question. (Matter of Riverdale Fabrics Corp. (Tillinghast), 306 N.Y. 288 (1954); Western Vegetable Oils Co., Inc. v. Southern Cotton Oil Co., 141 F.2d 235 (9th Cir. 1944)).

These principles have never been stretched, however, as Sprague & Rhodes would stretch them here. The writing must exist. A.B.C., Inc. v. AFTRA, supra, 479 F.2d 345 (10th Cir. 1973), J.S. & H. Const. Co. v. Richmond Co.

Hosp. Auth., 473 F.2d 212 (5th Cir. 1973). It must be available. Matter of Amer. Rail & Steel Co. (India Supply Mission), 308 N.Y. 577 (1955). The incorporated document must be sufficiently described. Lowry & Co. v. S.S. Le Moyne D'Iberville, supra, 253 F.Supp. 396 (S.D.N.Y. 1966). The actual incorporation must be explicitly accomplished. Western Vegetable Oils Co. v. Southern Cotton Oil Co., supra, 141 F.2d 235 (9th Cir. 1944).

Examined in such light, none of the cases cited by appellant's brief in support of the supposed incorporation by reference claimed at bar reaches so far as to bind one party to an arbitration clause buried in an unidentified writing withheld from it by the other party -- retained, as it were, in pectore.

In each of those cases -- and in all others we have been able to discover -- the transactional document in issue actually mentioned, described, or identified a delivered or extant writing. In no case we have seen, whether concerning an arbitration clause or any other contractual form, was a party bound to the unspecified fine print of an unidentified document retained in the possession of the other party. See, e.g., Danford v. Schwabacher, 342 F.Supp. 65 (N.D.Cal. 1972), app.dism. 488 F.2d. 454 (9th Cir. 1972); Matter of Emerson (Illustrated Tech. Prod.), 12 Misc.2d 1000 (Sup.N.Y. 1958).

On page 26 of its brief, appellant has cited several cases in which a party was bound to the terms of an

agreement he had failed to read. Reliance on these authorities is misplaced, for in each of them the writing was actually delivered to the party charged with knowledge of its terms. Thus, in Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975), the American sales manager of a German concern was bound by the terms of his German-language employment contract, a document he had received and signed. Accord, Southeastern Enameling Corporation v. General Bronze Corporation, 434 F.2d 330 (5th Cir. 1970), N & D Fashions, Inc. v. DHJ Industries, Inc., 548 F.2d 722 (8th Cir. 1976).

In the case at bar, however, the writing which Sprague & Rhodes insists Instituto should have "investigated" before delivery was something it called "contract 543'-F" -- a document it did not deliver, and never intended for the purchase of coffee.

In fact, Instituto had no such duty to "investigate." Under the most elementary principles of contract law, a completed contract was formed when Sprague & Rhodes' offer to purchase, as transmitted by its authorized agent, was accepted by Instituto's shipment of the coffee. All material terms of the contract -- price, quantity, destination -- were contained in Guzman's oral and written order. Once Guzman's authority was confirmed by the July 31, 1975 Telex (A-137), there was no reason for Instituto to hesitate. A reference to an undescribed document, which was never delivered, does not affect the enforceability of the contract, or the terms thereof. Application of the Uniform

Commercial Code produces the same result. UCC §2-206(1)(b). Any additional terms should be supplied by the commercial law of Mexico.

We note, with amazement, that Sprague & Rhodes has referred to two New York cases in support of its "incorporation by reference" contention. Neither of the New York cases cited involved arbitration, although nowhere has arbitrability been as intensively litigated as in New York.

New York State, as well as the United States, strongly favors arbitration and the enforcement of an arbitration agreement. National General Insurance Co. v. Investors Insurance Co., 37 N.Y.2d 91, 95 (1975). But in Matter of Level Export (Wolz Aiken & Co.), 305 N.Y. 82 (1953) and Matter of Riverdale Fabrics Corp. (Tillinghast), supra, 306 N.Y. 288 (1954), and their progeny, the New York courts have made it clear that the incorporation by reference of an arbitration clause requires not only an explicit reference to the body of rules or free-standing instrument sought to be incorporated, but also the declaration that those rules or provisions are expressly "incorporated."

In Riverdale Fabrics, the written contract in question declared that "[t]his contract is also subject to the Cotton Yarn Rules of 1938 as amended." The contract contained no arbitration clause, nor did it mention settlement of disputes by arbitration. The Court of Appeals denied arbitration:

"The intent must be clear to render arbi-

> tration the exclusive remedy; parties are not to be led into arbitration unwittingly through subtlety." 306 N.Y., at 291.

Indeed, when confronted with a situation virtually identical to the instant case, New York's highest court unanimously denied arbitration. Matter of Amer. Rail & Steel Co. (India Supply Mission), supra, 308 N.Y. 577 (1955). Accord, Matter of Emerson (Illustrated Tech. Prod.), supra, 12 Misc.2d 1000 (Sup.N.Y. 1958).

C. An arbitration clause cannot be supplied here through UCC §2-207.

As we have shown in Sections A and B of this Point, no arbitration clause was delivered or mentioned, and none was incorporated by reference. In its argument before Judge Pierce, Sprague & Rhodes contended that UCC §2-207 might remedy that omission.* Once again, however, each case we have found in which the applicability of that section was discussed involved a specifically identified or delivered arbitrati clause; and the only question was whether assent to be bound had been signified. Thus, in Medical Development Corp. v. Industrial Molding Corp., supra, 476 F.2d

* That section is reproduced as Addendum No. 1, infra. We note particularly that no theory has been advanced by appellant for referring to the UCC. Federal law of arbitration applies (Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), cert.granted 362 U.S. 909, cert.dism. 364 U.S. 801 (1960)); and perhaps federal law supports an examination of UCC concepts to arrive at the "general" contract law principles to be applied. Equal regard might also be had to the law of Mexico, where all the significant commercial contacts occurred. As to Mexican law, the opinion of the Orantes affidavit, par. 6 (A-92), is that no arbitration can be had on these facts absent a delivered written arbitration provision. Sprague & Rhodes has never contradicted that opinion of Mexican counsel.

345 (10th Cir. 1973), UCC §2-207(2)(b), the "material alteration" subsection, was discussed with respect to the April 1970 transaction -- the one in which the entire form had been delivered. But the court did not even discuss §2-207 when considering the May 1970 transaction, for there the arbitration clause had never been physically supplied.

In like fashion, the Sixth Circuit explored the utility of UCC §2-207(2) and (3) in Dorton v. Collins & Aikman Corporation, 453 F.2d 1161 (6th Cir. 1972), where every oral purchase order was confirmed by the seller's acknowledgement form containing an arbitration clause. The Seventh Circuit, in C. Itoh & Co. (America) Inc. v. Jordan International Co., supra, 552 F.2d 1228 (7th Cir. 1977), has also exhaustively reviewed the applicability of UCC §2-207 in a classic "battle of the forms" case. There, too, the arbitration clause in question was concededly received by the purchaser from the seller.

The C. Itoh opinion is particularly relevant to the case at bar; for there the Seventh Circuit concluded that in the battle of the forms, the arbitration clause was cancelled out by the conflict between the forms; and it refused to permit such a clause to re-enter the transactions by indirection from any quarter. Noting that the case involved "Federal rights asserted under the Federal Arbitration Act," and having concluded that the arbitration clause actually delivered did not enter the contract, the court declared that "there is no written arbitration provision in-

cluded in the contract created under Section 2-207(3) ..." (552 F.2d at 1238, emphasis in original). See, also, John Thallon & Co. Inc. v. M & N Meat Co., 396 F.Supp. 1239 (E.D.N.Y. 1975); Joseph Muller Corporation (Zurich) v. Commonwealth Petrochemicals, Inc., supra, 334 S.Supp. 1013 (S.D.N.Y. 1971) (arbitration clause delivered; assent thereto a matter of construction).

In short, we have found no case in which a successful effort has been made to supply an arbitration clause through the constructional maxims of UCC §2-207 where there has been no arbitration clause received or specifically mentioned in the communications between the parties.

D. There has been no "course of dealing" between the parties at bar; and neither the alleged course of dealing nor the alleged usage of trade can supply the missing arbitration clause.

Appellant has contended that, even where arbitration has neither been mentioned nor referred to in the transactions at issue, nevertheless an arbitration clause may be supplied through reference to the parties' customary course of dealings or to usage in the trade (UCC§1-205). All of the authority which we have been able to discover is to the contrary.

At the outset, however, it must be observed that there has been no "course of dealing" between the parties. There was no sequence of previous conduct between the parties upon which either of them ought to have relied, or which either of them could have intelligibly comprehended,

mandating that Sprague & Rhodes' two purchase orders were not to be deemed effective nor delivery made unless and until a GCA contract was signed. The conceded fact is that there were no dealings whatever between Instituto or its predecessor and Sprague & Rhodes for four full years prior to July-August, 1975.* It bears repeating that Guzman's oral orders which were confirmed by his letter (A-139) and substantiated as to his authority by appellant's Telex (A-137), constituted complete contracts for the sale of the coffee -- contracts which were in fact executed by the due delivery of the coffee in accordance with their terms.

Sprague & Rhodes has adverted to eight orders placed by it in 1970 and 1971 with Beneficios Mexicanos, the agency which preceded Instituto in the regulation of Mexican coffee export. Surely, however, a handful of 1970 and 1971 transactions with a different legal entity -- even then constituting only an infinitesimal part of its coffee export business -- cannot cast so long a shadow. Ward Foods, Inc. v. Local 50 Bakery & Confectionary Workers Union, AFL-CIO, supra, 360 F.Supp. 1310 (S.D.N.Y. 1973).

There is no trade usage indicated by the affida-

* Appellant has also adverted to its handful of purchases of Mexican coffee from other vendors between 1971 and 1975 as supporting a "course of dealing"; since evidence of those sales was filed with Instituto. The claim is absurd: (1) the written agreements between other Mexican vendors and United States buyers are not "approved" by Instituto, but only transmitted long afterward by the exporter for record-keeping purposes (A-133); and (2) even those transactions were de minimis, constituting about one percent of Sprague & Rhodes' worldwide coffee purchases (A-225) and about 3/10 of a percent of Mexico's sales (A-105).

vits or exhibits of contracting for the purchase of green coffee by the customary use of the GCA form; there is only testimony that the majority of such purchases by United States buyers is subsequently confirmed by them by the submission for signature of a standard GCA contract.

The custom and usage argument now urged by Sprague & Rhodes was presented in even more cogent form to the Seventh Circuit in C. Itoh & Co. (America) Inc. v. Jordan International Co., supra, 552 F.2d 1228 (7th Cir. 1977), and was there flatly rejected. In that case the seller's confirmation contained an arbitration clause. After that clause was cancelled out by the application of UCC §2-207(1) and (2), the seller urged that the clause might be supplied by custom and usage. As we have noted above (page 38 of this brief) the court declared that the Federal Arbitration Act requires a written arbitration agreement, and not one supplied by inference.

The same argument derives from Paragraph 4 of the Official Comment to UCC §1-205, where it is stated:

> "A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose office is to control and restrict the actions of the parties, and which cannot be abrogated ... by a usage of trade."

It is thus beyond the policy of UCC §1-205 to infer by operation of law a contract term, such as an arbitration clause, which a statute requires to be "written." See, e.g., Garnac Grain Company, Inc. v. Nimpex International, Inc., supra,

249 F. Supp. 986 (S.D.N.Y. 1964); C. Itoh & Co. (America) Inc. v. Jordan International Company, supra, 552 F.2d 1228 (7th Cir. 1977).

It should not require a repetition of all the cases cited hereinabove which emphasize that the requirement of a writing is not chimerical, but literal. Even given a delivered writing, there is no support for such a claim where the writing was not assented to. Where there is no writing, there simply can be no arbitration by mere custom and usage.

* * *

In light of the foregoing, the three questions posed by appellant on page 32 of its brief are readily answered. In each instance Instituto of course could not rely on any provision contained in Sprague & Rhodes' undelivered confirmation form. If any of the events posited were to have occurred, the rights of the parties would be determined by reference to the law governing the contract which they actually made--probably the commercial law of Mexico.

E. There is No Agreement to Arbitrate Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Appellant's reliance upon Section 4 of the Federal Arbitration Act (9 U.S.C. §4) may be misplaced: where a citizen of one nation seeks enforcement of a claimed arbitration agreement against a citizen of another nation, the recognition of an international agreement is now governed by the Convention

on the Recognition and Enforcement of Foreign Arbitral Awards [1970], 3 U.S.T. 2517, T.I.A.S. No. 6997, especially where litigation is pending in the courts of one such nation. The United States acceded to the treaty in 1970, and implementary legislation was passed. 9 U.S.C. §§ 201-208. Mexico acceded to the treaty in 1971 (A-92).

The Convention provides for the recognition of arbitration agreements and referral to arbitration:

"Article II

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Pursuant to the implementing legislation, an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States, and the district courts of the United States shall have original jurisdiction over such proceedings without regard to amount in controversy. 9 U.S.C. §203.

The Convention provided Sprague & Rhodes with the opportunity to resist the Mexican litigation by applying to the Mexican court for a reference to arbitration. It chose not to do so. Sprague & Rhodes could also have sought arbitration here under the implementing legislation before commencement of the Mexican litigation (9 U.S.C. §206). But the only fair reading of Article II, §3, we suggest, is that such an application can be made only in the court "seized of the action", once such an action has been started.

Since the Convention clearly controls, see, e.g., McCreary Tire & Rubber Company v. CEAT, 501 F.2d 1032 (3rd Cir. 1974), Sprague & Rhodes' failure even to mention it in its brief or in the voluminous papers submitted below is somewhat mystifying.*

An examination of the definition provided in Article II, §2 of an "agreement in writing" provides a clue to appellant's attempt to ignore applicable law:

> "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." (emphasis added).

The requirement for a writing is clearly more restrictive than that provided in the Federal Arbitration Act. The Convention definition precludes any incorporation by reference or other backhanded attempt to imply an arbitration agreement. The plain import is that unless a written arbitra-

*Instituto adverted to the implications of the Convention in both its memoranda submitted to the District Court.

tion clause passes between the parties and is assented thereto--and concededly none did here -- there can be no agreement to arbitrate.

The legislative history of the Convention, as well as judicial interpretations in other signatory nations, amply support this reading. Two proposals by the Netherlands delegates to the United Nations drafting committee, asking that the Convention provide that a confirmation in writing which contained an arbitration clause, if sent by one of the parties and not contradicted by the other, would constitute an "agreement in writing", were rejected. UN Document E/Conf. 26/L 17 26 May 1958; E Conf. 26/L.54 5 June 1958; see also, Union International des Avocats, International Commercial Arbitration, (1960) at p. 309.

The restrictive definition of "agreement in writing" has been upheld by decisions in Italy and Switzerland. Ditte Frey, Milota, Seitelberger v. Ditta F. Cuccaro e Figli, Corte d'Appello di Napoli (12/13/74), published at Rivista di Diritto Internazionale Privato e Processuale, 1975, p. 552; J. A. van Walfum N.V., Rotterdam v. Chevelines S.A., Geneve, Tribunal du Canton Geneve (6 e Chambre), 6/6/67, published at Schweizer-Ische Juristen-Zeitung, Vol. 64 (1968) p. 56.* cf. Israel Chemicals and Phosphates Ltd. v. N.V. Algemane Oliehandel, Voorburg, Netherlands, Rechtbank Rotterdam (6/26/70), published at Netherlands Jurisprudenties, 1970

* A discussion of these cases may be found in International Council for Commercial Arbitration, Year Book Commercial Arbitration (1976), at pp. 193-199.

#470, Uniform Law Cases, Undrite, 1970, p. 313. In the Swiss case, a buyer had submitted a purchase order which contained no reference to arbitration. The seller had responded with a confirmation which contained an arbitration clause. The buyer did not respond or object thereto, and the court held that an arbitration award under such circumstances was not entitled to such enforcement because the existence of a written arbitration agreement, as required by Art. II, §2, had not been shown.

The opinion of the Italian court went further still. There, the court was confronted with an application to enforce four Viennese arbitration awards rendered in favor of four Austrian suppliers against an Italian purchaser. The court found that in all four instances the suppliers had duly submitted purchase contracts containing an arbitration provision. In two instances, the Italian purchaser countersigned and returned a copy of the contract; in the other two, without apparently indicating any objection to the contract, it simply retained all counterparts.

On these facts, the Italian Court of Appeals granted enforcement to the two awards where a countersigned contract had been returned; and denied enforcement in the other two instances.

It seems clear to us, therefore, that the accepted t'pping point for determining the existence of an enforceable "agreement in writing" to arbitrate, under the Convention, lies far beyond any showing made or suggested by Sprague

& Rhodes. Under the Convention, even receipt of an arbitration provision does not bind a party to arbitration, unless it is expressly assented to. A fortiori where there is no receipt of a writing containing an arbitration clause, there is no submission to arbitration.

The Convention definition constitutes the law of the land, and should prevail over any less restrictive requirement of the Arbitration Act, since any conflict between the Convention and the Arbitration Act must be resolved in favor of the Convention. 9 U.S.C. §208.

POINT II

APPELLANT HAS FAILED TO MEET ITS THRESHOLD BURDEN OF SHOWING THAT THERE IS A GENUINE ISSUE AS TO THE EXISTENCE OF "A WRITTEN AGREEMENT FOR ARBITRATION"

In his opinion below (A-239), Judge Pierce concluded that Sprague & Rhodes "failed to make the required threshold showing that an arbitration agreement existed between the parties". We think it is clear from an examination of the affidavits and exhibits that Judge Pierce was right.

While the sixth sentence of Section 4 of the Federal Arbitration Act provides that "the court shall proceed summarily to the trial" of an issue as to whether an arbitration agreement was made, it is well established that the issue of the making of the "written agreement for arbitration" must be a genuine issue.

In Ocean Industries, Inc. v. Soros Associates International Inc., 328 F. Supp. 944 (S.D.N.Y. 1971), it was apparent from the affidavits and the documents submitted in connection with a petition pursuant to 9 U.S.C. §§3 and 4 that the arbitration clause which had been transmitted by defendant was rejected by plaintiff. The court held:

> "...defendant did not show this court where a genuine issue existed as to the making of the

> agreement for arbitration... In the case at bar, defendant has merely alleged at the hearing held before the court that there was an agreement to arbitrate based on the fact that the defendant mailed a document containing an arbitration agreement to plaintiff... The defendant has not made a sufficient showing to proceed with a trial on the issue of the making of an arbitration agreement."*
>
> 328 F. Supp. at 947-8.

Accord, A.B.C., Inc. v. AFTRA, supra, 412 F. Supp. 1077 (S.D.N.Y. 1976) (arbitration denied on affidavits and exhibits only, where no showing was made that an arbitration clause was incorporated**); District 2, Marine Engineers v. Falcon Carriers, Inc., 374 F. Supp. 1342 (S.D.N.Y. 1974) (arbitration denied on motion, where no written agreement to arbitrate was found).

The Second Circuit, in Almanacenes Fernandez, S.A. v. Golodetz, 148 F. 2d 625 (2d Cir. 1945), set forth the test to be applied in determining whether a "genuine issue" exists:

> "To make a genuine issue entitling the plaintiff to a trial by jury [of the existence of an arbitration agreement], a unequivocal denial that the agreement had been made was needed and some evidence should have been produced to substantiate the denial."
>
> 145 F. 2d at 628.

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* By contrast, in the instant case, although Sprague & Rhodes' counsel claim in their brief that an issue exists, neither by petition, affidavit nor exhibit have they averred even the delivery of an arbitration clause.

** While the opinion does not indicate whether a plenary hearing was held, the attorneys of record for plaintiff confirm by telephone that none was held.

Accord, Joseph Muller Corporation (Zurich) v. Commonwealth Petrochemicals, Inc., supra, 334 F. Supp. 1013, 1018-19 (S.D.N.Y 1971):

> "[The sixth sentence of 9 U.S.C. §4] cannot mean that a trial is necessary in every case where the court finds preliminarily that such an issue has been tendered. If upon the papers submitted and after a hearing thereon, there emerges only a question of law on which the court is 'fully informed', relief may be granted without a trial. After all, such an issue would never go to a jury in any case."

Sometimes the question of the presence of a "genuine issue" is raised by the party seeking arbitration; sometimes by the party opposing it. Cases dealing with both situations have etched out the principles which govern. It is clear, however, that the threshold burden of the party who seeks the enforcement of a purported right under 9 U.S.C. §4 is the greater burden; for he is seeking specific performance of an alleged arbitration clause in the face of a pending court litigation. 5 Moore's Federal Practice ¶38.12[3], p. 129; Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 (2d Cir. 1942).

This court has also enunciated the tests for determining the existence of a 'genuine issue". As the court (L. Hand, J.) declared in Radio City Music Hall Corp. v. United States, 135 F. 2d 715, 718 (2d Cir. 1943):

> "When a party presents evidence on which, taken by itself, it would be entitled to a directed

> verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result. In this case the defendant should have specified some instances that it had reason to suspect would contradict [plaintiff]; the record against it was too specific to be met by mere hypothesis."*

Measured by this standard, Sprague & Rhodes has patently failed to cross the threshold in the case at bar. An examination of Sprague & Rhodes' cleverly assembled submissions in support of its petition below exposes the absence of any assertion -- even a bare assertion -- that a writing mentioning an arbitration or containing an arbitration clause was ever delivered (see discussion at Point I (A), supra). The existence of a "written agreement for arbitration" is thus sustained by nothing more than hypothesis or surmise.

By contrast, Instituto provided Judge Pierce with a comprehensive and convincing showing that no such writing was submitted, no such reference was made.** In the face of such a showing, the "genuine issue test" required Sprague

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* Although that test was developed in the context of a summary judgment application, it was expressly applied to determine the presence of a "genuine issue" under 9 U.S.C. §4 in Almanacenes Fernandez, S.A. v. Golodetz, supra, 148 F. 2d at 628. See, also, Tubos de Acero de Mexico, S.A. v. Dynamic Shipping Inc., 249 F. Supp. 583, 587 (S.D.N.Y. 1966).

** See, e.g., the affidavits of Garza and Gonzalez, passim; the internal sales records of Instituto (A-219, 220); the communications received from Guzman and Sprague & Rhodes (A-137-139); the shipment and border transfer documents; the statements, acknowledgments and answer of Guzman.

& Rhodes "at least to specify some opposing evidence which it can adduce"; and this it has failed to do. It required Sprague & Rhodes to discredit Instituto's showing; and this, too, it failed to do.

In Point II of its brief to this court, appellant places reliance on A/S Custodia v. Lessin International, supra, 503 F. 2d 318 (2d Cir.1974), El Hoss Engineering & Transport Co. v. American Independent Oil Co., 289 F. 2d 346 (2d Cir. 1961), cert. den., 368 U.S. 837 (1961), and Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F. 2d 673 (2d Cir. 1972). In each of these cases, to be sure, the appellate court reversed a determination made by a district court judge without plenary hearing, and remanded for such a hearing. However, a simple examination of the facts presented in each such case more than amply distinguishes them from the case at bar.

Thus, in A/S Custodia, supra, it was conceded by both parties that an unsigned contract containing a standard arbitration provision had been delivered and received. The issue was whether the minds of the parties had met on the arbitration term of such a writing -- an issue quite different from the case at bar, where appellant contends, in the face of all the evidence, that Instituto assented to something neither referred to nor delivered. In El Hoss, supra, the contract containing the arbitration provision

(which was concededly signed by both parties) was conditional upon petitoner's performing certain acts. The issue for which plenary trial was required was whether those acts had been performed -- again, a far cry from Sprague & Rhodes' contentions in the instant case. Finally, in Interocean Shipping Co., supra, there was involved a flood of communications as to whether a fixture note (concededly delivered) incorporating various terms of a charter party (concededly available to both parties) adequately evidences assent to the charter party arbitration term. Again, the question was whether minds had met; and the communications between the parties repeatedly contradict each other on the point.

In short, the cases upon which appellant has relied here all involved obvious fact questions as to which the affidavits and exhibits in those cases were in apparent conflict. We fail to see the bearing of those cases on the question raised by appellant at bar. We have examined the purported factual issues propounded by Sprague & Rhodes at page 43 of its brief. We see no genuine issue of fact in any of them, sufficient to pass muster in accordance with the tests prescribed by the authorities we have cited. Specifically, question 1 is self-evidently a question of law, not of fact. As to question 2, we think it apparent as a matter of law that Instituto's conduct, on the exhibits and affidavits, was in all respects "reasonable and prudent";

and, as a matter of law, did not expose it to arbitration when the arbitration clause was unidentified and supressed by appellant (Point I, supra). As to questions 3 and 4, Sprague & Rhodes has simply failed to tender any showing, or to point to any potentially available proofs, that its confirmation forms 5481 or 5437 F were delivered, in the face of the panoply of opposing proofs submitted by Instituto.

The "genuine issue" test is surely sound, and performs a valuable judicial function. Flimsy or meretricious claims, or petitions simply tendered upon surmise, ought to be summarily dismissed. If arbitration is to serve the purposes for which it has earned legislative, judicial and commercial support, it must also be protected against abuse on the part of those whose real objective is to prevent or postpone any disposition of the merits of a dispute.

Appellant's brief (Point I, Part B) evidences confusion with respect to the pleading and proof responsibilities of one who invokes the Federal Arbitration Act. This confusion has led it to charge Judge Pierce with having denied its petition, or even a plenary hearing on its petition, because it pleaded in the alternative. It stresses that its right to plead alternatively is protected by the Federal Rules of Civil Procedure; and it even cites several cases -- in our view inapposite cases -- in which inconsistent pleading appears to have been permitted.

What Sprague & Rhodes has failed to comprehend, we believe, is that a petition brought under §4 of the Federal Arbitration Act, especially in the face of a pending litigation in a court of competent jurisdiction, imposes upon it a burden of adducing proofs, or pointing to a source of evidence, to sustain the existence of a written agreement for arbitration. Thus, Judge Pierce was quite correct in describing the "threshold burden" as "an essential requirement which is lacking even in petitioner's offer of proof." (A-238).

As this court declared in Almanacenes Fernandez, S.A. v. Golodetz, supra, 148 F. 2d 625 (2d Cir. 1945), the seminal case on the point:

> "To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed and some evidence should have been produced to substantiate the denial.
>
> 148 F. 2d, 628 (emphasis supplied)

Such is the standard imposed upon one who would resist arbitration in the face of an application under 9 U.S.C. §4. How much greater must the threshold burden be, then, for the party who avers the existence of a written arbitration agreement in the face of convincing evidence to the contrary? And even by the Almanacenes standard of an "unequivocal denial", we believe that Sprague & Rhodes cannot have it both ways.

In short, the issue is not one of pleading, but one of proof burdens. Nothing in the position taken by Instituto, or endorsed by Judge Pierce in his opinion, would deny Sprague & Rhodes the opportunity to insist that there was no agreement to purchase the 6,000 bags of coffee. Instituto would still defend against that claim if Sprague & Rhodes ever reaches the point of presenting its view of the merits in an appropriate forum. Rather, Instituto claims, and Judge Pierce found, that there was no arbitration agreement -- quite a different thing.

The decisions upon which Sprague & Rhodes places its heavy reliance do not support its position. In General Guaranty Insurance Co. v. New Orleans General Agency, 427 F. 2d 924 (5th Cir. 1970), the court simply said that there was no inconsistency in pleading the "abandonment" of a contract and at the same time urging that litigation be stayed pending arbitration. There is clearly no inconsistency between a claim that a contract has been abandoned, or expired, or modified, or altered, and at the same time insisting that the arbitration agreement in such a contract nevertheless continues to be enforceable. It is a far different thing, however, to claim, as Sprague & Rhodes does in the case at bar, that there never was a delivery of a document referring to or containing an arbitration clause, and then to insist upon arbitration.

To the same effect, apparently, is Genesco, Inc. v. Joint Council 13, 341 F. 2d 482 (2d Cir. 1965), also cited by Sprague & Rhodes. That case says simply that a defendant is entitled to reserve his right to deny the existence of a contract in a litigation, if its argument that a dispute was arbitrable was rejected. And there, it should be pointed out, the plaintiff had sued for damages under a writing which itself contained an arbitration term; while Insituto has sued on a contract of sale formed by oral orders, confirmed by letter (A-139) and Telex (A-137), and accepted or executed by delivery of the goods.

It may be that the source of Sprague & Rhodes confusion on the pleading question is its failure to grasp the difference between an application for a stay under 9 U.S.C. §3 and an application for a direction to arbitrate under 9 U.S.C. §4. Under the former, no provision is made for a hearing; and therefore the averments of the petition scarcely need pass the pleading stage. In the latter, however, where a plenary hearing may result if a genuine issue is tendered, the duties of petitioner to come forward with a showing are explicit and unequivocal. Kulukundis Shipping Co. v. Amtorg Trading Corp., supra, 126 F. 2d 978; Tepper Realty Co. v. Mosaic Tile Company, 259 F. Supp. 688 (S.D.N.Y. 1966).

In sum, Sprague & Rhodes' pleading is not drawn into question; but rather, its failure of proofs.

POINT III

THE JUDGMENT ENTERED IN THE MEXICAN LITIGATION RENDERS THE INSTANT APPLICATION MOOT

A. The Mexican Judgment Renders the Controversy res judicata.

Appellant seeks arbitration of a matter that has already been adjudicated. Since the dispute between the parties has been determined by a court of competent jurisdiction, there is "no controversy to arbitrate." Freemont Cake & Meal Co. v. Wilson & Co., 183 F. 2d 57 (8th Cir. 1950).

Freemont is squarely on point. There, appellant sought to compel arbitration pursuant to 9 U.S.C. §4, and to stay a pending state court action brought by appellee. Appellee's answer asserted that the contract did not provide for arbitration, and that the pending state court action was the proper forum. By a supplemental answer, appellee alleged that a judgment had been rendered in its favor by the state court.

The Eighth Circuit affirmed the District Court's findings that appellant was not entitled to specific performance under 9 U.S.C. §4. The court went on to state:

> "In addition to this it may be observed that before this proceeding was instituted the actual substantive controversy between the parties had already been adjudicated by a court having juris-

> diction both of the parties and the subject matter. There was no remaining substantive controversy between the parties. The only controversy here involved is as to the procedure by which the actual controversy should be determined. The controversy itself having been adjudicated, the proceeding to determine the procedure came too late as there was no controversy to arbitrate." 183 F. 2d, at 59.

Although the term "res judicata" is not utilized in the Freemont decision, clearly the applicable principle there and here is that the Mexican judgment is entitled to be given res judicata effect by this court. The three factors required by this Circuit to support a defense of res judicata are present: (1) the Mexican judgment was a "final judgment on the merits"; (2) the identical issues sought to be raised were decided in the prior action; and (3) the party against whom the defense is asserted was a party to the prior action. See, Kreager v. General Electric Company, 497 F. 2d 468, 472 (2d Cir.), cert. den. 419 U.S. 861, reh. den 419 U.S. 1041 (1974) Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F. 2d 944, 955 (2d Cir.), cert den. 377 U.S. 934 (1964). Appellant is thus bound by the findings of the Mexican court and cannot seek to relitigate the controversy in any forum, arbitral or judicial.

The fact that the Mexican judgment was obtained by default does not alter its res judicata effect. The general rule is that where the court has the requisite jurisdiction, a default judgment is just as conclusive an adjudica-

tion between parties of whatever is essential to support a judgment as when rendered after answer and complete contest in the open courtroom. 1 B Moore's Federal Practice, ¶0.409 [7]; United States v. Martin, 395 F. Supp. 954 (S.D.N.Y., 1975); Woods v. Canaday, 158 F. 2d 184 (D.C. Cir. 1946); Moyer v. Mathas, 458 F. 2d 431 (5th Cir. 1972). "The polestar is whether a reasonable method of notification is employed and reasonable opportunity to be heard is afforded to the person affected." Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F. 2d 435, 443 (3rd Cir. 1971).

Clearly, Sprague & Rhodes was given notice of the proceeding and opportunity to defend, and indeed availed itself of that opportunity.* According to the Orantes affidavit (A-91-92), which was not controverted by any evidence below, the jurisdiction of the Mexican court was clearly proper. The jurisdiction would surely withstand the fairness test recently enunciated by the Supreme Court in Shaffer v. Heitner, 97 S. Ct. 2569 53 L.Ed. 2d 683 (1977).

The fact that the judgment was rendered by a court of a foreign country does not lessen its res judicata effect. See, e.g., Petition of Bloomfield Steamship Company, 422 F. 2d 728 (2d Cir. 1970); Cooley v. Weinberger, 390 F. Supp. 479 (E.D. Okla), aff'd 518 F. 2d 1151 (10th Cir. 1975);

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* In its petition and motion papers below, Sprague & Rhodes made no mention of its special appearance in the Mexican litigation. It was of course cited by Instituto to Judge Pierce, and discussed fully in argument before him. We find it incredible that Sprague & Rhodes has once again attempted to have an adjudication without advising this Court of such fact, as to which its appellate brief is silent.

Somportex, supra (English default judgment held enforceable); Von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and a Suggested Approach," 81 Harv. L. Rev. 1601 (1968).

B. The Mexican Action Cannot Be Stayed

Appellant's motion below sought a stay of the Mexican litigation (A-11, 36). That aspect of its motion was denied, and not made an issue on this appeal. We address the point briefly, nevertheless, because arbitration has been made an issue, and stays are often sought in such situations. (As to Sprague & Rhodes' attack on the Edelstein order (A-37), we rest on the opinion of Judge Pierce.)

There is no authorization in the Federal Arbitration Act for a federal court to stay a proceeding commenced in a foreign country. §4 of 9 U.S.C. merely authorizes the court to compel arbitration. §3 of the Act authorizes a stay of proceedings only by the court in which such suit is pending:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (Emphasis added.)

In addition, under the Convention a stay can only be sought where a litigation is pending:

> "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Article II, §3.

An injunction against prosecution of a foreign country action is an extraordinary remedy which can be granted only in the rarest of circumstances.

> "The use of the injunctive power to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed, for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal." Arpels v. Arpels, 8 N.Y. 2d 339, 341 (1960) (Fuld, J.).

The principle of comity guides the courts in dealing with the authority of the foreign tribunal, and urges great restraint in the use of injunctive power. "... [T]he direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint." Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F. 2d 577, 578 (1st Cir. 1969). In Canadian Filters, plaintiff had brought an action in the federal court for a declaration

that defendant's U.S. and Canadian patents were invalid. Defendant then sued in Canada for infringement, whereupon plaintiff sought to enjoin the Canadian suit. Based upon the comity "which the federal courts owe to courts of other jurisdictions," 412 F.2d at 578, the First Circuit vacated an injunction granted by the District Court against prosecution of a Canadian action. The court noted that plaintiff had sought the "wrong relief":

> "Rather than, in effect, attempt to strongarm the Canadian court, it should have asked that court, if it thought it was so entitled, to postpone its proceedings until the United States court had taken action." 412 F.2d at 579.*

We stress again that the Convention allocates to the court seized of the action the duty of staying that action where a right to arbitration exists. The Convention was intended to establish for all signatory nations an interdependent and reciprocal system for avoiding precisely the interface between independent sovereigns and their courts which Sprague & Rhodes seeks to create through this proceeding. The Convention is, both here and in Mexico, the law of the land. Paramount considerations of national policy should warrant a refusal on the part of this court to be drawn into a challenge to the sovereignity of the Superior

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* As the Appendix indicates (Orantes affidavit, par. 7, A-92), the powers of the Mexican court to deal with preliminary challenges are fully as broad of those of the federal courts.

Court of Justice of Mexico.

Especially should this be so where that court has already rendered judgment. And in the instant proceeding, any request to stay enforcement of the judgment is surely premature.

POINT IV

IT WOULD BE INEQUITABLE TO ORDER THE PARTIES TO ARBITRATE IN NEW YORK

A court considering an application under 9 U.S.C. §4 -- a request for specific performance of an arbitration agreement -- is a court of equity. See, e.g., Leesona Corp. v. Cotwool Mfg. Corp., Judson Mills Div., 315 F. 2d 538, 542 (4th Cir. 1963). Kulukundis Shipping Co. v. Amtorg Trading Corp., supra, 126 F. 2d 978, 987 (2d Cir. 1942). It is entitled to balance the equities before directing the parties to arbitrate. We believe that the equities herein militate against a direction to arbitrate.

A. Substantial risk exists of inconsistent judgments.

A judgment in Instituto's favor has been entered in the Mexican action. A direction to arbitrate the controversy could result in a judgment in Sprague & Rhodes' favor.

Such inconsistent results must be avoided. In Netherlands Curacao, N.V. v. Kenton Corporation, 366 F. Supp. 744 (S.D.N.Y. 1973) a request for a stay pending arbitration was denied on a finding that arbitration of the particular issue had been waived. The court, instead, stayed arbitration of any other issues:

> "To avoid conflict with the ultimate decision of this Court, the arbitration will be stayed pending the outcome of this action. See Leesona

> Corp. v. Cotwool Mfg. Corp., Judson Mills Div., 315 F. 2d 538 (4th Cir. 1963). Irreparable injury...may result if the processes of this Court are not permitted to determine the controversy, particularly since the comity normally afforded the judgments of this court in foreign jurisdictions may be adversely affected by a possible inconsistent arbitration award." 366 F. Supp. at 748.

And in Freemont Cake and Meal v. Wilson, supra, the court stated:

> "A conflict of jurisdiction is always to be avoided if possible and it is a general rule that the right of a plaintiff to prosecute his suit in a court having once attached, will not be taken away by proceedings in another court." 183 F. 2d at 60.

The Mexican judgment, we believe, would be entitled to recognition in the United States. (See Point III, supra). And any arbitration award rendered in New York would be entitled to enforcement in Mexico under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (See Point I, Part E, supra). This would be an intolerable situation, and would impose hardship upon both parties. A substantial expenditure of the public funds of Mexico has already been made to litigate in that country and to resist the instant application. We urge this court not to impose upon that government and its taxpayers the burden not only to litigate the same controversy twice but also to litigate the question of which adjudication should prevail. From the strenuous efforts Sprague & Rhodes has

already made to avoid a hearing on the merits, we have no illusions about enforcement of the judgment Instituto has already obtained. We expect that it will force Mexican funds to be expended to the full wherever enforcement is sought.

B. Mexico is the proper and convenient forum for the resolution of this dispute.

As Judge Pierce recognized (A-239), resolution of the dispute in Mexico "would be much more likely to afford the most complete relief to all parties involved."

The events in issue -- the making of the agreement, the employment of the agent, and the matters regarding payment -- occurred predominantly in Mexico. The witnesses are mostly within that jurisdiction. Indeed, a crucial witness -- appellee's agent, Guzman -- is not subject to process in New York, nor are the other coffee exporters to whom appellant claims to have made payment.

Where arbitration will not result in a complete resolution of the dispute between all interested parties, a court may refuse to enforce even an admitted agreement to arbitrate. For example, in Bunge Corporation v. MV Furness Bridge, 390 F. Supp. 603 (E.D. La. 1974), a subcharterer bypassed the charterer and brought an action against the shipowner in personam. The shipowner sought to stay the suit pending arbitration. Its agreement with the charterer provided for arbitration; the subcharter also provided for arbitration, but there was no arbitration agreement between the subcharterer and the shipowner.

Both charter parties provided for arbitration in London; however, it was shown that the two arbitrations could not be consolidated, nor could a third party be impleaded into either arbitration. The charterer, not being before the court, could not be compelled to arbitrate. In addition, the possibility of inconsistent results from two arbitration proceedings existed. If the action were allowed to continue, however, the charterer might be made a party, in which case the claims of all involved parties could be resolved in a single proceeding.

Judge Rubin concluded that in these circumstances the court action should not be stayed.

> "Arbitration would be more cumbersome and dilatory than litigation, and, since it would not in all likelihoood avoid the expense of at least some litigation, it would prove to be more expensive to add to these litigation costs the burden of arbitrators' fees and other expenses of arbitration." 390 F. Supp. at 605.

A direction to arbitrate this controversy would have the same results that the Bunge court sought to avoid -- prolongation of the dispute, increased expenditures for legal fees, and incomplete adjudication as to all interested parties, including Guzman and Penagos.

In addition, as Judge Pierce noted, only Sprague & Rhodes is truly present in New York. Instituto's small office in New York serves only a publicity function; it is not equipped to deal with sales, payments or an ongoing litigation; and it has no senior officials (Garza affidavit, par. 47 A-122).

Under these circumstances, the district court was clearly correct in finding that Mexico is the proper forum for a resolution of this dispute. Domingo v. States Marine Lines, 340 F. Supp. 811 (S.D.N.Y. 1972); Prock v. Weissinger, 276 F. 2d 446 (4th Cir. 1960); DeSaurigne v. Gould, 83 F. Supp. 270 (S.D.N.Y. 1949); aff'd. 177 F.2d 515, cert. den. 339 U.S. 912.

C. Sprague & Rhodes Has Waived Any Right to Arbitration

Sprague & Rhodes engaged Mexican counsel to contest the jurisdiction of the court (A-93-95). It did not raise the defense of arbitration or seek to stay the proceeding, though that option was clearly available to it pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (see Point I(E), supra) and under Mexican internal law (Orantes affidavit, par. 7, A-92). Coupled with Sprague & Rhodes' failure to demand arbitration in accordance with the Green Coffee Association Rules of Arbitration and its failure to raise the possibility of arbitration in the vast amount of correspondence and conversations which occurred following Instituto's demand for payment, such failure may constitute a waiver of any right to compel arbitration.*

* We recognize that there is much conflict of authority over whether waiver of a right to arbitrate is an issue for the court or the arbitrators to decide. cf. World Brilliance Corporation v. Bethlehem Steel Company, 342 F. 2d 362 (2d Cir. 1965) with Necchi Sewing Machine Sales Corp. v. Carl, 260 F. Supp. 665 (S.D.N.Y. 1966). In re Tsakalotos Navigation Corp., 259 F. Supp. 210 (S.D.N.Y. 1966). World Brilliance has apparently been confined to instances where the defense of waiver was based upon failure to seek arbitration within the time specified in the contract. Tsakalotos, supra, 259 F. Supp. at 212-13; Necchi, supra, 260 F. Supp. at 668. Where the claim of waiver is based, as it is here, upon court action, then the issue of waiver is for the court to decide.

In Fremont Cake and Meal Co. v. Wilson, supra, 86 F. Supp. 968 (D.C. Neb. 1949), aff'd 183 F.2d 57 (8th Cir. 1950), the court refused to compel arbitration because the party seeking it had not taken the steps prescribed by the agreement for initiating arbitration. The initiation of an action under 9 U.S.C. §4 was deemed not to constitute a "demand".

> "Stated simply, until one party to the contract has pursued its prescribed initiatory steps, it has not made any 'demand' and thereby decisively required the other party to answer, or to act upon, such demand for arbitration; and the vital condition precedent to a mandatory order to proceed to arbitration has not been performed." 86 F. Supp. at 975.

More importantly, Sprague & Rhodes chose to enter an appearance to contest the jurisdiction of the Mexican court. It did not attempt to compel arbitration or seek a stay of the action, which it could have done under Mexican law and the Convention. We recognize that it is well established that participation in a litigation, standing alone, does not constitute a waiver of the right to arbitration. Carcich v. Reder; A/B Nordie, 389 F. 2d 692 (2d Cir. 1968), and that a finding of waiver is usually based on more extensive participation in the litigation, such as asserting a counterclaim or participating in discovery, Demsey & Associates v. S.S. Sea Star, 461 F. 2d 1009 (2d Cir. 1972); Cornell & Company v. Barber & Ross Company, 360 F.2d 512 (D.C. Cir. 1966).

The courts have repeatedly emphasized, however, that it is "the presence or absence of prejudice which is determinative of the issue." Carcich, supra, 389 F.2d at 696; Liggett & Myers Incorporated v. Bloomfield, 380 F. Supp. 1044, 1047 (S.D.N.Y. 1974); Weight Watch of Quebec Ltd. v. Weight W. Int. Inc., 398 F. Supp. 1057 (E.D.N.Y. 1975). We think it clear that Sprague & Rhodes' failure to raise the arbitration question in its appearance in Mexico, or during months of negotiation, has sorely prejudiced Instituto. Instituto never considered arbitration as a possibility -- it had never seen, nor knew anything about, a purported arbitration agreement. It commenced the Mexican action with the utmost good faith. As explained in the Orantes affidavit (Par. 20-21, A-99-100) once the litigation was commenced, Mexican procedure would not contenance an abeyance of prosecution: Instituto had to continue the action or forfeit all rights against Sprague & Rhodes and Guzman. In addition, Instituto's officials could have been charged with dereliction of duty for failure to pursue the claim.

Due to Sprague & Rhodes' unexplained delay, Instituto has incurred substantial legal fees in two countries. It has expended public funds of Mexico attempting to settle amicably, or to litigate properly. In these circumstances a finding that Sprague & Rhodes has waived any right to compel arbitration would be consistent with the equitable powers inherent in this court.

CONCLUSION

For the reasons set forth hereinabove, the decision of the District Court should be affirmed in all respects, and the petition and applications of appellant dismissed.

Respectfully submitted,

SILBERFELD, DANZIGER & BANGSER
Attorneys for Respondent-Appellee

Robert M. Blum
Judy A. Bluestein
James G. Samson

Of Counsel

ADDENDUM NO. 1

§ 2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

SPRAGUE & RHODES COMMODITY CORPORATION,
Petitioner-Appellant,

- against -

INSTITUTO MEXICANO DEL CAFE,
Respondent-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York
That on the **30th** *day of* **Sept.,** *19* **77** *at* **40 West 57th St New York, N.Y.**

deponent served the annexed *upon*

Appellee Brief

Philipps Nzer Benjamin Krim & Ballon

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **30th**
day of **Sept.,** *19* **77**

Victor Ortega

Victor Ortega

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979